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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Criminal Action No.
	:	1:16-cr-10094-LTS
v.	:	
ROSS MCLELLAN,	:	
Defendant.	:	

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

STATUS CONFERENCE

Tuesday, April 24, 2018
2:10 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
raeufr@gmail.com

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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is April 24th, the case of United States v. Ross McLellan, criminal action 16-10094, will now appear before this Court.

Counsel, please I've themselves for the record.

MR. FRANK: Stephen Frank and William Johnston for the United States. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WEINBERG: Good afternoon. Martin Weinberg with Rob Goldstein, on behalf of Ross McLellan.

MR. GOLDSTEIN: Good afternoon.

THE COURT: Good afternoon.

All right. So I saw you filed two motions yesterday. Any -- before we get to those, any updates on anything that either of you want to report or --

MR. FRANK: Not much by way of updates from us, Your Honor. We have been in further contact -- I think the last time we were here, there was one of the Irish victims that we had not been able to make contact with. I did make contact with that victim. I forwarded a list of documents that Mr. Weinberg had provided and that he was seeking in

1 priority order, the document requests in priority order, and
2 I have not heard back. We've been playing a little bit of
3 phone tag. So I expect that I will hear back at some point.
4 But they were considering that request.

5 The other Irish victim has not responded to
6 multiple inquiries on our part.

7 THE COURT: One question that I had for context is,
8 in the course of all the documents that you've produced or
9 made available, in some form or another, to the defense, do
10 those include documents from each of the victims? Or are
11 they documents -- they are certainly documents from State
12 Street, right?

13 MR. FRANK: Correct.

14 THE COURT: And some of those may have derived
15 originally -- you got them from State Street, but they came
16 from the victims. Maybe.

17 MR. FRANK: Well, they're -- the overwhelming
18 majority of the documents that we obtained in the course of
19 our investigation and produced to the defense, were documents
20 that we obtained, directly or indirectly, from State Street.
21 Necessarily, those include communications between State
22 Street and the victims.

23 THE COURT: Yes. Okay.

24 MR. FRANK: With respect to the -- we never
25 subpoenaed or issued letters rogatory to -- or pursued MLATs

1 to the foreign victims. There are a couple of stray
2 documents that we received on a voluntary basis that were
3 turned over, but not in the -- not in the way of a large
4 production from any of those.

5 With respect to the more recently charged domestic
6 victim, there was a production of about 58,000 documents that
7 we received, 58,000 pages that we received from that victim,
8 that we turned over to the defense.

9 THE COURT: And at the trial, do you anticipate
10 witnesses from each of the victims?

11 MR. FRANK: Not from each of the victims, but from
12 several of the victims.

13 THE COURT: From several victims.

14 MR. FRANK: Now, what I will say, Your Honor, is
15 that since the first time we had this conversation, a couple
16 of months ago or six weeks ago, the defense has received a
17 fair number of documents. And in fact, two weeks ago, the
18 defense received a production from the City of London police,
19 which is itself comprised of productions from a number of the
20 entities in the UK from which they sought documents.

21 They have been reviewing those documents for the
22 past two weeks. They've notified the Court that some of
23 those documents are of interest to them. We just, today,
24 received from the defense a thumb drive containing those
25 documents. We don't know what's in there. They've also

1 received a production of documents from the victim in the
2 Netherlands.

3 THE COURT: The ones they referred to in their
4 motion.

5 MR. FRANK: Correct.

6 So relative to where we are were when we started
7 having these discussions, there are tens of thousands of
8 pages of materials that the defense is now in possession of,
9 that they were not in possession of.

10 With respect to the three witnesses, who's
11 testimony they want to take, we are essentially in the same
12 place we were, except that there's the additional fact, which
13 I think I mentioned to the Court last time, that the
14 Government is in a similar position. There's at least one
15 witness that we wanted to call, who has not agreed to come
16 over here and testify, nor has that witness agreed to a
17 voluntary taking of her testimony in London, nor has she
18 agreed to appear by video. So both --

19 THE COURT: Can you MLAT a witness? In other
20 words, can you invoke the MLAT to take testimony either by
21 deposition or videoconference?

22 MR. FRANK: I think we could invoke the MLAT to
23 take testimony, at least in the same way that, if we received
24 a Rule 15 deposition order from this Court, I think we could
25 probably invoke the MLAT process.

1 THE COURT: And then take the deposition over
2 there.

3 MR. JOHNSTON: Correct. I don't think we can force
4 the defendant -- a witness to come here.

5 THE COURT: Okay. So that would be your remedy, so
6 to speak, for the person that you point out, if you decided
7 that there was a basis for a Rule 15 order and a basis for an
8 MLAT request, and if you thought that there was enough time
9 and it was important enough in terms of the work involved,
10 and what have you, all of those very different --

11 MR. FRANK: It's a theoretical remedy, Your Honor,
12 but it's not a practical remedy. Because we have a trial
13 date.

14 THE COURT: Right.

15 MR. FRANK: And we believe we should stick to that
16 trial date.

17 THE COURT: Right.

18 MR. FRANK: And so my point is only that we are
19 similarly situated. We have a trial date, and we can't get
20 the victim -- the witness to come here to testify. We can't
21 get the witness to testify there. So we're without that
22 witness.

23 THE COURT: Okay. Anything you want to add,
24 Mr. Weinberg?

25 MR. WEINBERG: Just several things. I'll be short.

1 One, we're really not similarly situated, since the
2 Government, at any time in the past -- since 2015, when they
3 started the investigation, had the unilateral ability to rely
4 on MLATs to get testimony, certainly squarely within the MLAT
5 procedure. They chose not to. They could have gotten
6 documents. They could have gotten testimony. They chose to
7 rely on State Street as an almost exclusive source of the
8 evidence that's been provided.

9 MR. FRANK: I don't want to interrupt, Your Honor,
10 but I'm going to, just briefly, to correct one thing.

11 We are similarly situated. In fact, Mr. Weinberg
12 did seek letters rogatory, did obtain letters rogatory, to
13 obtain testimony from two of the very same witnesses he now
14 wants us to go get an MLAT to take testimony from, again.
15 Had he sought to take their testimony one time, in a Rule 15
16 deposition, for purposes of both proceedings, he would have
17 that testimony now. But he made a tactical decision not to
18 do that. And now our position is he needs to live with the
19 consequences of that tactical decision.

20 MR. WEINBERG: To equate letters rogatory and MLATs
21 is farfetched, given our joint --

22 THE COURT: So just to clarify one thing, (a), I
23 think it's irrelevant -- I'm going to decide the motions that
24 are presented to me. And as a general proposition, the
25 Government and the defendant in criminal cases aren't

1 similarly situated. The Government has certain positions.
2 It's not like a civil case over money damages. And the
3 Government has certain rights and obligations that the
4 defense doesn't have, and the defense has certain rights that
5 it can advance that don't really apply to the Government. So
6 you're different.

7 Second, though, with respect to the more narrow
8 question to which Mr. Frank is referring to, which is
9 acquiring evidence, the question isn't -- I'm not going to
10 determine whether you're similarly situated or not, because
11 I'm not sure what -- I understand why you make the point, in
12 atmospheric or sense, Mr. Frank, but I don't know that it
13 bears on the legal question.

14 The legal question is you've asked for certain
15 things, and are you entitled to those. And to the extent
16 they are discretionary, should I exercise the discretion,
17 given all the factors, to award that relief or not. And if
18 the Government is not handicapped or is handicapped, I don't
19 know that it advantages or disadvantages. But as to these
20 two particular witnesses -- so I don't know where -- I
21 understand your point, but I don't know that it makes a
22 difference.

23 MR. FRANK: If I can just make one narrow addendum
24 to the point. I understand what the Court is saying. But we
25 are similarly situated in one sense, which is that I could

1 have, some time ago, sought an MLAT to take the testimony, to
2 compel the testimony of this witness. I didn't do that, and
3 now I'm living with the consequences of that decision, which
4 is that I have a June trial date, and I'm not going to have
5 her testimony.

6 Similarly, Mr. Weinberg, a year ago, more than a
7 year ago, made a decision to seek letters rogatory to compel
8 the testimony in the civil proceeding of two former State
9 Street lawyers in the United Kingdom. He made a tactical
10 decision not to seek their testimony in this case. But now,
11 having taken their testimony in the civil proceedings, on the
12 eve of trial, he wants to compel us to go get it for him or
13 delay the proceedings so he can go get it again. And that is
14 a way in which we are similarly situated. He made a decision
15 not to take an earlier --

16 THE COURT: Perhaps. But it isn't -- it isn't the
17 similarly situated that I understood you to be referring to
18 before.

19 MR. FRANK: Well, we both have witnesses overseas,
20 whose testimony we'd like to take. We didn't seek to get it
21 compelled earlier, and now we need to live with the
22 consequences.

23 MR. WEINBERG: Well, there's three differences.

24 One is, Mr. Frank knew I was taking the
25 depositions, could have moved to join them.

1 Second of all, I didn't know anything about this
2 witness that Mr. Frank wants to call.

3 Three, we do know there's going to be witnesses
4 from the Irish client. Only the Government has the right to
5 ask the prosecutors in Ireland to honor a request for letters
6 rogatory. Or the Irish government has told us through our
7 Irish counsel, if Mr. Frank, if the US Attorney, Department
8 of Justice asks for this information, then your letters
9 rogatory will be implemented through our process.

10 THE COURT: You mean asks for it in the form of an
11 MLAT request?

12 MR. WEINBERG: Yes.

13 THE COURT: Or just asks for it generally?

14 MR. WEINBERG: Via an MLAT.

15 MR. FRANK: I don't have that right to do that on
16 behalf of the defense. I have the right to do that on behalf
17 of the Government in a prosecution.

18 THE COURT: He's saying what they're saying, which
19 is it may be that -- I'm not saying that this is the case,
20 but what I understand him to be saying is that the Irish
21 government takes the position that they won't honor a letters
22 rogatory request, unless there is an MLAT request coming by
23 bay of the prosecuting authorities. It may be that you
24 don't -- maybe, maybe not, I haven't decided, but that you
25 don't have the authority to ask for that.

1 But even if you don't have the authority to ask for
2 that, it doesn't mean that the Irish government, operating
3 under Irish law, doesn't take the position that that is a
4 necessary precondition to the enforcement in Ireland of a
5 letters rogatory. I'm not saying it is. But what I
6 understand him to be making here is not an argument about
7 your authority to ask for it, as much as what their position
8 is as to whether they can act on the --

9 MR. WEINBERG: But it's also about the Government's
10 authority.

11 MR. FRANK: Our position is that the Irish
12 government would not respond to an MLAT request, were they to
13 understand that we were simply a mouthpiece of the defense
14 making that MLAT request.

15 MR. WEINBERG: But the Government is a mouthpiece
16 for the interest of justice. I understand asymmetry when
17 they're investigating, but to ask for this Irish treasury, a
18 critical client, one of the substantive counts, two witnesses
19 on the Government witness list, to ask for them to produce
20 documents that will assist the trier of fact to understand
21 whether a client is guilty or innocent is not being a
22 mouthpiece for the defense. It's discharging the
23 Government's obligations, that only they can discharge, to
24 provide evidence that gives us a fair trial.

25 MR. FRANK: That's not true, Your Honor.

1 Mr. Weinberg doesn't know what's in those documents. He
2 can't represent to this Court that there's anything in those
3 documents that would be of assistance to the defense or
4 assistance to the Government. He simply wants to go on a
5 fishing expedition and see what's out there. And the
6 Government is never under an obligation to assist the defense
7 to go on a fishing expedition.

8 MR. WEINBERG: You're assisting the Court in
9 providing documents that, in the ordinary case, when the
10 Government is calling witnesses from a company and claiming
11 they're a victim, they would have the company's documents.

12 This is an unusual case, where the Government
13 allowed State Street, in essence, to be the source of the
14 investigation. And we should not be denied those documents
15 from that client.

16 What I can say to the Court is, having gotten
17 documents from one of the UK clients through the letters
18 rogatory process, they're enormously helpful and important.
19 We've set out some of the general reasons in our motion for
20 continuance. I have every reason to believe that the Irish
21 documents would be just as material and just as exculpatory
22 on the various issues, such as with whether or not the
23 revenues that the Government says are the undisclosed fees,
24 were really material to the client in terms of what their
25 alternatives were, what the other companies were proposing.

1 And that's a critical issue.

2 MR. FRANK: As a matter of law, Your Honor, that
3 has nothing to do with materiality. So we can do away with
4 that argument right now. Whether they could have gotten the
5 services from somebody else for a different price has no
6 bearing on whether the decision to engage in this
7 transaction, at this price, with this bank, was materially
8 influenced by the representations before made.

9 MR. WEINBERG: Of course it is. If three other
10 banks were charging \$100, and State Street is charging 20,
11 and when you add \$10 for extra, unknown fees, they would have
12 gotten the deal for \$30, they would have chosen State Street.
13 And the proof is almost every one of their six clients went
14 back to State Street, after the deals that the Government has
15 criminalized, for further transitions, knowing how much the
16 prior deals cost them. They didn't know the breakout, how
17 much State Street got. Rather --

18 THE COURT: Maybe it shows that they thought that
19 now that State Street had been prosecuted by the United
20 States Government and that two high-level employees had
21 been --

22 I assume, upon the indictment, that was the end of
23 Mr. McLellan's work.

24 MR. WEINBERG: This was before, Your Honor. This
25 was during the 2011 period. Many of the Government victim

1 clients went back to State Street, asked State Street for
2 further proposals. Some hired State Street to do further
3 transitions before the press blew this up.

4 Now, Mr. Frank may say --

5 THE COURT: But I guess there's two different
6 questions. One question is whether the jury decides, in the
7 end, that these alleged misrepresentations charged in the
8 indictment were material or not. Right?

9 MR. WEINBERG: Yes.

10 THE COURT: That's going to be a question that the
11 jury is going to have to decide. And the second question --
12 and that's not one -- neither of you are asking me to take
13 materiality from the jury, right? Isn't that an element of
14 the offense?

15 MR. FRANK: That is an absolute element of the
16 offense, Your Honor.

17 MR. WEINBERG: Yes.

18 THE COURT: So the question of whether a piece of
19 information is relevant, that the jury can consider in making
20 its materiality determination, is a different question. And
21 I think the question we have here, I would think that price
22 seems like the kind of thing that, in most transactions, is a
23 relevant and material consideration. But that would be for
24 the jury to decide. But whether they were -- cared about the
25 price or whether they were more focused on quality or service

1 or the amount of money at the end, or other things in these
2 transactions, will be what the evidence is for the jury.
3 Whether there's enough -- what you're really saying --

4 Are we arguing the motion to continue now? I'm not
5 quite clear what, at this point, we're arguing.

6 MR. WEINBERG: It's a combination. I've asked Your
7 Honor to issue the orders for the MLATs in Ireland, which
8 I've asked for. It's also relevant to the continuance
9 motion, because we are seeking and expect to get further
10 information.

11 THE COURT: So let me just frame a couple things,
12 so we can keep this more little focused.

13 With respect to the MLAT motions, I understand
14 what, as a general matter, you are seeking and what the legal
15 positions are. And I think I heard argument from you
16 previously on those motions. I'm of the view that I need to
17 decide those motions, and for whatever the decision is. But
18 I need to decide those. I think that, at this point, that
19 makes the most sense.

20 And the last time I saw you I think I said I was
21 going to proceed to probably decide them. I certainly wasn't
22 going to hold them in abeyance, and I haven't held them in
23 abeyance. But I -- well, anyway, the fact of the matter is,
24 I haven't done it yet. But I do think I need to do it soon.
25 So I need to resolve those motions, and I will do that.

1 If there's a particular point that either of you
2 want to make with respect to those motions, beyond simply
3 that either it's -- the stuff underlying that you're seeking
4 is really important and matters to you, and therefore, you --
5 that -- to the extent that it's relevant to the legal
6 analysis to consider, I have that point.

7 And to the extent the point is that, really, this
8 isn't -- even though materiality is an element of the
9 offense, it's a materiality of the transaction, and this
10 information from the victims isn't really that material. So
11 in a sense, I can cut it off at the pass, putting aside the
12 question of MLAT authority and the like because none of this
13 really matters, I got that.

14 I understand your points. And you've articulated
15 them in the papers, too, and so you don't really need to
16 reiterate to those.

17 So one, I'll do that. If there's something else to
18 add that hasn't been said before, that you just feel like you
19 need to emphasize or update in light of what's transpired
20 since I heard from you before on the MLAT, I'll hear that
21 now. Otherwise, I'd say I'll take the MLAT motion under
22 advisement, and I will issue something promptly.

23 MR. WEINBERG: And we jointly agree to submit it on
24 the papers.

25 MR. FRANK: Yeah. We have nothing further to add

1 to what we've said and what we say in our papers on that
2 particular motion, Your Honor. I would say that, and I know
3 the Court understands this, we've already made disclosures to
4 the defense last week. Three days later, the defense filed a
5 motion for a continuance.

6 THE COURT: This is the continuance issue. Let me
7 pause. Okay.

8 The next issue is -- it seems to me there's two
9 other issues. There's two motions that you just filed.
10 Those are the three things, if you will --

11 MR. FRANK: Correct.

12 THE COURT: -- on my docket, to speak of in this
13 case.

14 MR. FRANK: Correct.

15 THE COURT: So let's circle back. As to the
16 questionnaire, which is, in a sense, independent of his
17 motion for a new trial, I understand from the conferral
18 certificate that you oppose. And my question is, do you just
19 wish to be heard on it, or do you wish to issue a written
20 opposition? Or do you briefly want to tell you what your
21 view is and then --

22 MR. FRANK: I can briefly tell you what our view
23 is. And if it would be helpful to the Court, we are
24 certainly happy to issue a written opposition first.

25 THE COURT: Why don't you do that.

1 MR. FRANK: We reviewed the proposed questionnaire
2 before it was submitted to the Court or pursuant to the
3 defense motion. We believe there are a number of questions
4 on there that are simply standard background questions that
5 the Court always asks. We don't believe those need to be
6 submitted to the jury by way of a questionnaire.

7 We believe there are a number of other questions on
8 there that are not particularly relevant, that are sort of
9 prejudicial in the very nature of the question. But for
10 example, there's a question on there about whether the
11 members of the jury have -- have ever had an account at a
12 credit union. It's hard for me to conceive of the relevance
13 of whether the witness -- the jurors have ever had a credit
14 union account, to the trial of an executive at a --

15 THE COURT: Let me ask you this question. I will
16 say that the relevance of the credit union question eluded
17 me.

18 But rather than -- before you get to the particular
19 individual questions, just as to whether, whatever the scope
20 is, there should be a questionnaire or not.

21 MR. FRANK: We don't think there needs to be a
22 questionnaire. What I was going to say, Your Honor, is to
23 the extent that there are three or four questions on there
24 that we don't have a particular objection to, there's no
25 reason that those require a questionnaire. Those are

1 questions that a Court could easily ask in an ordinary voir
2 dire.

3 THE COURT: So my question to you, Mr. Weinberg --
4 I would group your questions into three categories. Some are
5 like -- they would ordinarily be asked. Some are -- like I
6 would be happy to from you, not at the moment, but I would be
7 happy to hear from you on whether to ask them or not -- like
8 credit union, I don't really see what that has to do with
9 this case, but I'm sure you have a reason.

10 MR. WEINBERG: I do.

11 THE COURT: And so third are some that are not
12 standard questions, but seem like the kind of questions, or
13 touch upon topics, even that might not ask it the way you
14 posed, framed it there, they are the kind of topics that
15 likely would come up or reasonably would be discussed to be
16 asked in a case like this.

17 But the fundamental question is, why would I not do
18 this in the ordinary way of asking, as we typically do,
19 questions of the venire, and then individual voir dire, where
20 they come up and I'll ask them individual questions --

21 Let me step back, since neither of you --

22 What I would ordinarily do in most cases, what I've
23 done in every case, save one, is ask the venire general
24 questions, where people raise their hand to respond. It's a
25 format with which I'm sure you're familiar. And then I would

1 bring up to sidebar any person who answered yes. And maybe
2 if you wanted any person -- I would tell people, "If you
3 didn't raise your hand but you want to come up, you can come
4 up."

5 At sidebar, I would ask follow-up questions about
6 the things that they had raised their hand about, and then I
7 would permit both of you to ask reasonable follow-up
8 questions about the topics that were put in play about what
9 they spoke about at sidebar.

10 And then I would send them back, and then
11 eventually seek, depending on whether it's one or two rounds,
12 alternates and jurors, separate or not; but say if we're
13 doing them separately, as the rule suggests, 12 jurors, I
14 would ask them all what they do for work, what their spouse
15 does, to the extent you don't know and haven't heard from
16 them. And then you would do your peremptories, and we would
17 do round by round, no back-strikes, and then do the second.

18 I'm sure you have done something like that.

19 MR. WEINBERG: Yes, I have.

20 THE COURT: Since I've copied it from others.

21 MR. WEINBERG: Regularly.

22 THE COURT: So given that, why not do it that way?
23 Why do I need to do a questionnaire?

24 MR. WEINBERG: (A), I think that when jurors get a
25 questionnaire and have some time to reflect and to write out

1 an answer, to the extent it's not a yes or no, you're going
2 to get a more accurate and affirmative statement. Whereas
3 jurors sometimes don't want to raise their hand, they don't
4 want to speak, they may be hesitant to speak. Some of these
5 topics are personal: Have you suffered financial losses?
6 Feelings about the industries. And this is a case that
7 carries with it a significant amount of potential prejudice.
8 People have suffered through the 2008 and '09 recession.

9 THE COURT: Right. But this case, it's not a
10 mortgage case. This isn't like a bank that -- I don't recall
11 any cases -- I've had a lot of mortgage cases, but I don't
12 recall any with State Street. Maybe they have been in cases,
13 and I don't recall. But they're not a company whose staple
14 business was mortgages and lending mortgages or mortgage
15 servicing. They're not an investment banking house whose
16 name is tied to the 2008 meltdown. And so this case itself
17 is not about retail transactions or investment banking
18 transactions. The transactions at issue in this case are --
19 so people might have some initial financial industry bubble
20 or, you know, quick response to that, but as they hear about
21 the case, it is not about that.

22 MR. WEINBERG: I think it's about whether power is
23 open and transparent with clients and customers. And there's
24 a -- people walk in, and they have an inherent bias that
25 banks can't be trusted, bankers can't be trusted, people

1 dealing in Wall Street can't be trusted, and it's hard to get
2 to the bottom of it. And yet that drives people's
3 predispositions about receiving the evidence.

4 And it's a lot of inherent issues to the criminal
5 justice system, prosecutors, you know, defense lawyers,
6 people charged with crime. I have not asked any of that.
7 I've really stripped this from questionnaires that I've asked
8 judges and judges have given.

9 But this is -- I've tried to narrow it down to
10 areas where people will come in, not biased against
11 Mr. McLellan because of publicity, but having serious
12 feelings about banks, bankers, brokers, Wall Street, that
13 will be focused on whether or not they give Mr. McLellan his
14 presumption of innocence to start a criminal trial.

15 I also say that there's no prejudice to the
16 Government or to the justice system. Questionnaires like
17 this may actually provide the Court and provide the parties
18 with a better predicate to exercise peremptory challenges and
19 a better predicate to know when there's the potential for
20 cause challenges that should have a court ask further
21 questions. This is not a great burden. This is not like
22 other questionnaires.

23 THE COURT: Right. But partly I'm wondering --
24 it's not clear to me that, to the extent there's the kind of
25 prejudice that you suggest, or potential prejudice that you

1 suggest, it's not clear to me that a questionnaire, these
2 questions, necessarily, ferret that out. It might be more
3 successfully --

4 Well, first, my experience is, as to certain
5 things, especially about topics that are not as loaded as,
6 say, discrimination charges, people are fairly open in what
7 they're unhappy about and not shy about expressing it. And
8 this isn't like a case where someone would -- in order to be,
9 quote, biased, would be admitting to some sort of
10 discriminatory prejudice that is viewed often as socially
11 unacceptable. So it seems to me, to the extent it needs to
12 be addressed, it's addressed just in the ordinary voir dire.
13 I mean, that's the way I would be thinking about it.

14 MR. WEINBERG: I just think the questionnaire
15 process, Judge, helps jury selection, helps fair and
16 intelligent cause and peremptory challenges. I don't see it
17 as a great burden. I can't represent that this case is
18 unique.

19 THE COURT: I understand.

20 MR. WEINBERG: It's not unique. There's no
21 publicity, there's no civil rights issues. But there's not a
22 great burden on using a tool that other judges have used on
23 white collar cases that help each party identify people that
24 ought not to be here for a three- or four-week trial.

25 THE COURT: All right. Anything about that?

1 MR. FRANK: To the extent that there are questions
2 that we can agree on, we have no objection to, obviously,
3 those questions being asked the jury. But I think the only
4 thing that the Court has heard about the reason that we
5 should have a questionnaire in this case is Mr. Weinberg's
6 anecdotal suggestion that maybe jurors give more thought in
7 writing down their responses. And I would suggest that
8 there's at least as much reason to believe that jurors are
9 more careful when they're answering a question directly to a
10 federal judge, as they are when they are writing down on
11 paper in the anonymity of the jury room.

12 THE COURT: All right. I'll about it. I think
13 what I'll do is take it under advisement. If I think it's
14 helpful to have you file something in writing, I'll ask you
15 to do that.

16 MR. FRANK: Thank you, Your Honor.

17 THE COURT: But at the moment, I think I understand
18 the issues.

19 That brings us to a motion for the continuance of
20 the trial. So I know you oppose it. I read it last night.
21 I'm happy to hear you about it. But I'm also happy to -- I
22 don't want to foreclose anything. And I'm not telegraphing
23 anything by saying that. In the ordinary course, people get
24 to file written responses to written motions. And I'm not
25 requiring you to file a response. I didn't know how you

1 wanted to do this.

2 MR. FRANK: Again, similarly, we're happy to do
3 whatever would be most helpful to the Court.

4 We do oppose it. We think, depending on what the
5 Court does with the MLAT motion, obviously that will have an
6 impact on the continuance motion. In other words, if you
7 grant the MLAT motion, you're necessarily granting a
8 continuance.

9 But assuming you don't grant the MLAT motion, we
10 oppose a continuance for a number of reasons, one of which is
11 the amount of time that has already elapsed since the
12 indictment of this case. Witness memories fade over time.

13 Also witness availability becomes more
14 questionable. We know that our witnesses are available now
15 at the beginning of June. I can't say whether they will be
16 available at whatever date the Court sets.

17 One thing that I do know is that Mr. Johnston is
18 not available in mid September, which is the date that
19 counsel has suggested. So we would necessarily either be
20 looking at a date prior to then, when Mr. Weinberg has said
21 he was not available and when a continuance wouldn't really
22 be of help to him, or we would be looking at a longer
23 continuance than that. And that's a pretty long continuance,
24 given a case that's already this old.

25 So we're happy to reduce that to writing. And I

1 don't know if there's any other arguments that we'll come up
2 with. But we'll do whatever is most helpful to the Court.

3 THE COURT: Okay. What do you want to add?

4 MR. WEINBERG: Not much, because we set out the
5 grounds yesterday. I think Your Honor --

6 THE COURT: One question that I have is, suppose
7 you persuade me, then how do I know -- there's nothing about
8 the motion for continuance that makes me think that all the
9 reasons that you're advancing now won't apply anew in
10 August or -- in August?

11 MR. WEINBERG: For this reason, Your Honor. The
12 second of the two principal grounds for the continuance is
13 our receipt, since the adding of the new charge, which I
14 believe was added on February 7th. I'm not going to reargue
15 severance, but it did add a series of challenges, new
16 witnesses. Three of the 14 are directed towards that.

17 THE COURT: That's why you have Mr. Goldstein right
18 here, right? You got six. It's about right. You got six
19 charges, right? And Mr. Goldstein can handle one. I mean,
20 it's not that much heavy lifting for him to do one charge and
21 one count of an indictment.

22 MR. WEINBERG: We were actually laughing downstairs
23 that we, in a million-and-a-half page, 12,000 audio case,
24 getting 100,000 pages of new documents, about 60,000 from the
25 Government and about 50,000 from State Street, on prior

1 17(c)'s, and we're expecting 20 to 30,000 more on the
2 domestic insurer new 17(c)'s, we're almost anesthetized to
3 what it means to integrate over 100,000 pages in the final
4 month or final two months or final three months of pretrial
5 preparation. It's a challenge, even to a man of
6 Mr. Goldstein's relentless resources and energies.

7 THE COURT: So you're withdrawing the motion?

8 MR. WEINBERG: It's difficult. I can't say --
9 whenever Your Honor tells us to start trial, we're going to
10 start trial. But the combination of awaiting new letters
11 rogatory, translating the one we received, I think, last week
12 for one of the clients; getting from the UK the final three
13 or four entities. And it looks like they're ready to
14 finalize our efforts, which have gone on for over a year, to
15 convince the UK authorities that our requests are focused
16 enough on Goldman and Nomura to get their documents.

17 We're awaiting a UK client that Mr. Frank is trying
18 to get us information on. We're awaiting the Irish client,
19 that is a pivotal client. It's one of the three major
20 clients that the Government is relying upon in this case.
21 It's important.

22 When you add what we're expecting over the next
23 month or two, to what we know we're receiving on the domestic
24 insurer, from the domestic insurer and from State Street, to
25 everything else that we've received since the Government

1 added the count and since Your Honor ruled on the 17(c), and
2 since we got the letters rogatory information, it's beginning
3 to filter in and we have to integrate it.

4 We gave the Government an expert disclosure with
5 four experts. I know the Government gave us their
6 non-witness 3500 and a list of audios. We're going to give
7 the Government this Friday, whether or not Your Honor grants
8 the continuance, a list of our audios. We're working
9 collaboratively to have this case fine tuned.

10 But I think that we would be better prepared and be
11 better lawyers, with all of the new information, new charges,
12 and new foreign information, if Your Honor gave us a
13 continuance to August 11, which would permit us to try the
14 case in August before Labor Day. After Labor Day, if
15 Mr. Johnston is unavailable the last couple of months in
16 September, to start it the first week in October.

17 Mr. McLellan has not caused society any problems.

18 Mr. Frank, in the abstract, fears unavailability.
19 But he's had weeks knowing that we're moving for a
20 continuance, I've told him, to see whether there, in fact, is
21 unavailability.

22 I think the parties really would both be better
23 prepared to try a case in a few months --

24 THE COURT: So you said that's the second reason.
25 Essentially, what I understand it to be is there's a lot of

1 material received since February, digesting it.

2 MR. WEINBERG: Yeah.

3 THE COURT: You prefer to have more time to digest
4 it, and that's why -- but what's the --

5 MR. WEINBERG: The first reason is we're seeking
6 and expect to receive, whether through the Government's
7 efforts with the Irish client, whether through our own
8 translating the Netherlands materials, whether it's through
9 the UK efforts, which are finally seemingly --

10 And again, we've had foreign lawyers working for
11 over a year, to work on these letters rogatory. We're
12 finally getting the fruits. They're important to us. I
13 expect we'll have more over the next month or two from the
14 UK, hopefully from Ireland, definitely from the Netherlands
15 translations. I expect the Goldman and Nomura information,
16 now that we've gone back and narrowed again our requests.

17 And you know, I don't know whether we're going to
18 have it on June 3rd, June 5th. The end of May? There's a
19 little bit of imprecision. I'm not in control of the foreign
20 processes. But we've done our absolute best.

21 And given its importance, I don't know what
22 countervailing consideration outweighs the combination of
23 this huge volume of new materials, the new charge that the
24 Government brought on February 7th, and our continuing
25 receipt and reasonable expectation of receiving even

1 additional materials from the foreign countries.

2 I'd say one more thing, which is the Government has
3 told me, and I have no reason to doubt their sincerity, that
4 they don't expect, currently, to have another alleged
5 co-conspirator as a witness, which might be a witness on the
6 domestic insurer charge. They've named three witnesses, but
7 none of them are -- they're all, you know, workers.

8 THE COURT: I don't know what you mean by that.

9 MR. WEINBERG: Well, I'm concerned that we're going
10 to be a week before trial, two weeks, three weeks before
11 trial, and added to all of these other concerns, the volume
12 of materials --

13 THE COURT: That there would be someone who is not
14 now named as a co-conspirator, unindicted co-conspirator,
15 would be so named.

16 MR. WEINBERG: Yeah.

17 THE COURT: And you don't -- based on your
18 conversations with the Government, don't expect that to
19 happen.

20 MR. WEINBERG: No. I --

21 MR. FRANK: Well, it's not a question of named
22 co-conspirator. Mr. Weinberg knows who the alleged,
23 unindicted co-conspirators are, I believe. It's a question
24 of whether there would be another witness.

25 THE COURT: Whether you would call someone --

1 MR. FRANK: Correct.

2 THE COURT: -- who is one of those people who you
3 haven't, so far, indicated that you're going to call.

4 MR. FRANK: That's correct.

5 THE COURT: I see.

6 So what you, Mr. Weinberg, don't expect is one of
7 the unindicted co-conspirators, whom you're aware, and is not
8 presently on the Government's witness list, you don't expect
9 that somebody will move from unindicted non-witness to
10 unindicted witness.

11 MR. WEINBERG: No. I was inartful, because I don't
12 know where Mr. Frank is at. He's been candid with me in
13 saying that he doesn't currently expect -- doesn't currently
14 have a co-conspirator witness, other than the two defendants
15 that have pled, probably at least one of them before Your
16 Honor. But that could almost be the tipping point. In other
17 words, we're trying to deal with 100,000 documents, and
18 Mr. Frank has reserved the right, over the next four or five
19 weeks, to add another co-conspirator witness, which makes it
20 more difficult, because these witnesses come with dozens of
21 thousands of e-mails.

22 And so it's another concern that I have, as we work
23 through the schedule, in all cases. But this case is
24 weighty. Motions in limine, we filed one today with a
25 *Grunewald*, and there will be other motions in limine. Your

1 Honor wanted the ones we can identify filed not necessarily
2 the last seven days.

3 THE COURT: What's the --

4 MR. WEINBERG: Whether or not the Government
5 evidence that came after the end of the six transitions, it
6 was more in the nature of whether or not there was
7 concealment from State Street, you know, could be --

8 THE COURT: Whether that's admissible.

9 MR. WEINBERG: Whether it's admissible and under
10 what circumstances, et cetera.

11 THE COURT: Anything that you wanted to say on the
12 continuance issue?

13 MR. FRANK: Just some practical points, Your Honor.
14 All of us could be better lawyers with more time. Right?
15 It's a little scary to think that Mr. Weinberg could be an
16 even better lawyer. But all of us could be more prepared
17 with more time.

18 But a year ago, when the Court addressed this
19 issue, which was already a year into the case, Your Honor
20 said you were inclined to make this the last continuance, in
21 part because of the fact that the defense had waited a year
22 into the case before even filing those letters rogatory, for
23 which we are now awaiting responses. And what the Court I
24 believe said was that regardless of where we were in
25 responses to those letters rogatory, we were going to proceed

1 with the date of June 4th.

2 You know, Mr. Weinberg mentioned there are two
3 cooperating witnesses. Those cooperating witnesses have
4 waited a very long time to be sentenced. If we get another
5 adjournment, they're going to -- there's going to be -- one
6 of two things is going to happen. One of those witnesses is
7 not before this Court. That witness will either be sentenced
8 without the benefit of having had the opportunity to complete
9 his cooperation, or his life is going to be in limbo for that
10 much longer.

11 If Your Honor adjourns this again, we're looking
12 at, given Mr. Johnston's schedule -- and I just want to be
13 clear about that. His trial starts at the end of October, so
14 he can't do something in mid September, because that would
15 put it basically up until the beginning of his next complex
16 fraud trial.

17 MR. WEINBERG: His trial is in October? You said
18 October.

19 MR. FRANK: His trial is in October. You're asking
20 for mid September. He can't do a trial in mid September
21 that's going to lead up to the eve of his trial in October,
22 and then turn around and do another complex fraud trial in
23 Arizona.

24 MR. JOHNSTON: Las Vegas.

25 MR. FRANK: Las Vegas. Same difference.

1 THE COURT: Roll the dice.

2 MR. FRANK: He can't turn around and do another
3 complex fraud trial within a couple of weeks after this
4 trial. That trial is going to go through November. So what
5 we're really looking at is sort of early 2019 for a case that
6 was indicted in March of 2016. That doesn't seem reasonable.
7 But that's essentially what the defense is asking for here.

8 I've mentioned the issue with our cooperating
9 witnesses. But our other witnesses, it's not fair to them,
10 as well. It's not fair to the victims in this case, either,
11 Your Honor.

12 MR. WEINBERG: Judge, I'm ready. I've got a
13 personal family wedding on August 4th that, you know, I'm
14 ready to start the trial several days thereafter. So we can
15 try this case in August, we can try this case the first day
16 of September and be ready weeks before Mr. Johnston's next
17 responsibility.

18 MR. FRANK: I'm not available then, Your Honor.

19 MR. WEINBERG: Start it the day after Labor Day,
20 we'll be finished in September. That will give Mr. Johnston
21 a break before his October trial. That will give us added
22 months to get ready.

23 THE COURT: Okay. Thank you. I'll think about it.
24 I'll resolve it soon. I know that, obviously, one way or the
25 other, you both want the answer.

1 MR. FRANK: Well, the only other small point that I
2 would mention on that point, Your Honor, is we have other
3 disclosures that are due to be made in less than two weeks.

4 THE COURT: It's not going to take me two weeks.

5 MR. FRANK: Thank you.

6 THE COURT: All right. Should I -- at the moment,
7 I'm not sure I have anything else on the calendar in this
8 case before the final pretrial a couple days before. So if
9 you -- why don't the two of you do this. I'm not going to
10 schedule something right now. I'm running a little behind
11 schedule today, anyway. The two of you can talk to each
12 other. I'm happy to see you whenever you think it's helpful.

13 In the meantime, assume you're going to be seeing
14 me, if I haven't put it on the docket, we'll put it on the
15 docket the Thursday before the trial for a final pretrial
16 conference. I think I set dates for motions in limine and
17 jury instructions and voir dire and suggested to you to do
18 earlier things that you thought would be helpful to resolve
19 earlier. If either of you think there are other dates that I
20 should schedule or you want to see me at other times, just
21 ask Maria, or file just like a one-sentence request and I'll
22 do it.

23 And go back -- if I haven't -- I think I did set
24 those dates, but if I didn't, then you could confer with each
25 other and propose a set of dates that makes sense for both of

1 you, given the complexity of the case, that tees up those
2 issues in time for me to read them before the final pretrial.

3 Anything else? Okay. Thank you very much. We're
4 adjourned.

5 THE DEPUTY CLERK: This matter is adjourned.

6 THE COURT: Oh. One thing that I wanted to tell
7 you about, if we go forward in June, if I deny the motion to
8 continue, Thursday, June 14th, we won't sit, because the
9 court is having an all day sentencing symposium that day that
10 I need to participate in. So we'll go the day before, we'll
11 go the day after, but there's that one Thursday. So just in
12 terms of planning purposes, that day we won't have court.

13 MR. FRANK: Thank you, Your Honor.

14 MR. WEINBERG: Thank you, Judge.

15 (Court in recess at 2:52 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 7th day of January, 2019.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter